1980

Michael E. Wood v. Thompson Flying Service, and State Insurance Fund : Brief of Defendants

Utah Supreme Court

PETER W. GUYON; Attorney for AppellantTIMOTHY C. HOUPT; Attorneys for Attorney for Respondents

IN THE SUPREME COURT

OF THE STATE OF UTAH

MICHAEL E. WOOD, Plaintiff, vs. THOMPSON FLYING SERVICE and THE STATE INSURANCE FUND, Defendants.	:	Case No. 16912

WRIT OF REVIEW FROM AN ORDER OF THE

INDUSTRIAL COMMISSION OF UTAH

BRIEF OF DEFENDANTS

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NAUTRE OF THE CASE

A writ of review was filed by Michael E. Wood to review the final Order of the Industrial Commission of Utah denying him temporary total disability benefits for which he had applied pursuant to the Workmen's Compensation Act.

DISPOSITION BY THE INDUSTRIAL COMMISSION

A hearing was held in this matter before Administrative Law Judge Keith E. Sohm on November 5, 1979. On November 28, 1979, Judge Sohm entered an order denying the claimant's application for temporary total disability benefits on the ground that his injury did not arise from an accident which occurred in the course of his employment and on the ground that the applicant was not totally disabled during the period of time for which he sought compensation. A Motion

for Review of this Order was filed by the applicant. On January 22, 1980, the Industrial Commission denied the Motion for Review and adopted the Findings of Fact and Conclusions of Law made by the Administrative Law Judge as its Final Order.

RELIEF SOUGHT ON APPEAL

The defendant respectfully requests that the Supreme Court affirm the Order of the Industrial Commission.

STATEMENT OF FACTS

The plaintiff Michael E. Wood sustained a slight concusion in a fall from a golf cart which occurred at the Salt Lake County Airport on July 29, 1978. At the time of his injury he was employed as the Vice President of Thompson Flying Service whose offices were located at the airport. In addition to certain managerial responsibilities Mr. Wood flew as a pilot for his employer.

On the afternoon of the day he was injured, Mr. Barry Hansen, an employee of Thompson Flying Service, approached Mr. Wood in his office and sought his advice about marital problems. (R. 41) Mr. Wood, Mr. Hansen and several other employees agreed that that evening after work, at about 8:00, they would talk the matter over. (R. 42) After acquiring beer for a Lear jet crew and for themselves, they remained at the airport after that hour "talking about the problem" (R. 42) Mr. Wood stated he drank two or three cans of beer. (R. 72)

Mr. Wood testified that sometime thereafter he and Mr. Hansen and the others went riding in a golf cart. He explained

that at approximately 10:30 p.m., while riding in the cart,

> I was trying to alleviate some of his problems--we engaged in a little tiny bit of horseplay . . . .

(R. 42) Mr. Wood stated that he poured a can of beer into Mr. Hansen's lap who then attempted to pour a can of beer into his lap. (R. 71) To avoid being showered with beer himself, Mr. Wood stood up in the moving golf cart and fell over backwards, striking his head and sustaining the injury complained of. (R. 71) The plaintiff was rendered unconscious after his fall and then apparently lapsed into sleep; he was snoring when the others in the cart retrieved him. (R. 46)

Mr. Wood was taken to the emergency room at LDS Hospital where it was determined he had suffered a concussion. He was found to have an odor of ethanol on his breath and was believed by admitting physicians to be intoxicated. (R. 2) He was hospitalized during the following ten days for testing and observation and returned to work for Thompson Flying Service on August 15, 1979, approximately two and a half weeks after his accident. Medical expenses incident to his hospitalization and compensation for his period of disability were paid by the defendant State Insurance Fund.

Upon his return to work, Mr. Wood resumed his position with Thompson Flying Service which he retained until the following January. During that period of time he worked full time for his employer and received an increase in his salary. (R. 53)

Shortly after his injury, Mr. Wood was required by Federal Aviation Association regulations to renew the medical certifi-

cation which qualified him for a first or second class pilot's license. (R. 48-49). The medical certification expired by its own terms every six months and a first or second class license was necessary for eligibility to fly as a pilot. Because of his injury and hospitalization, he was denied the necessary medical certificate (R. 51-52) and was unable to fly as a pilot until the following year in September, 1979, when his certificate was reissued. (R. 62)

On January 22, 1979, after working full time in a managerial capacity for five months after his injury, Mr. Wood resigned his position with Thompson Flying Service. He testified that he resigned under pressure from the owner of his company which was brought to bear on him because other employees had complained about his harsh style of management. (R. 54-56).

After his resignation, Mr. Wood renewed his efforts to obtain second or first class certification as a pilot. (R. 58) He was admitted to the Veterans Administration Hospital for a three day neurological evaluation on January 29, 1979 which revealed a minor brain wave abnormality. (R. 59) His medical certification was once again denied. (R. 59) Mr. Wood decided to appeal the denial and underwent additional medical testing at the University of Utah Medical Center. The neurologists who examined Mr. Wood on that occasion felt that his denial of certification was unjustified and submitted reports to the FAA supporting him in his assertion that there was no medical reason to withhold certification. (R. 61) As the result of a hearing before the National Transportation

Safety Board on September 13, 1979 Mr. Wood was recertified as a pilot.

From January 22, 1979, the date of his resignation from Thompson Flying Service, until September 13, 1979, Mr. Wood held a ground school offering flight instruction which did not require him to function as a pilot. (R. 64-65) He also performed odd jobs at his apartment complex to defray the cost of his rent. (R. 64)

Mr. Wood alleged before the Industrial Commission that he was totally disabled during the period of time from his resignation to his recertification and that he is entitled to temporary total disability compensation for this period of disability.

ARGUMENT

POINT I

THE APPLICANT WAS NOT DISABLED DURING THE PERIOD OF TIME FOR WHICH HE SEEKS TEMPORARY TOTAL DISABILITY BENEFITS.

The Industrial Commission denied the plaintiff's application on the basis of its finding that his injury did not occur in the course of his employment and its finding that he was not totally disabled during the period of time for which he seeks compensation benefits. The Commission found that Mr. Wood's departure from Thompson's Flying Service was not related to his injury and that he was not incapacitated during the following nine months. Neither in his Motion for Review nor his Petition to this Court has the plaintiff challenged the Commission's finding that he was not totally disabled during the period for which he seeks benefits. No other award

was sought. The defendants submit that the Commission's undisputed finding that the plaintiff was not totally disabled during the period for which he seeks compensation is supported by his own uncontroverted evidence and is dispositive of this appeal.

The basis for entitlement to temporary total disability benefits was discussed by this Court in its opinion in the case of Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617 (Utah 1977). On appeal, the defendant employer and defendant insurance carrier contended that the Industrial Commission exceeded its authority by awarding temporary total disability compensation to an injured employer during an unusually lengthy period of recovery from her industrial injury. This Court affirmed the Commission's order and stated that

> Such benefits are intended to compensate a workman during the period of healing and until he is able to return to work, usually when released for that purpose by his doctor . . . it is properly awardable only during actual inability to work which is found to have been caused by and is properly attributable to the industrial accident.

Id. 562 P.2d at 619-620.

Considering generally the definition of compensable disability, Professor Larsen states in 2 Workmen's Compensation Law, §57.10, p. 10-4

> The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients,

> whose recurrence in different proportions gives rise to most controversial disability questions: The first ingredient is disability in the medical or physical sense, as evidenced by obvious loss of members of by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is 'de facto' inability to earn wages, as evidenced by proof that claimant has not in fact earned anything.

During the period between his resignation from Thompson Flying Service in January, 1979 and his recertification as a pilot in September, 1979, the plaintiff was not, by his own admission, unable to work. He operated a ground school and did odd jobs around his apartment complex. Nor did those nine months constitute a "healing period" such as was referred to by this Court in the Ortega decision. His period of convalescence extended for some two weeks after his injury whereupon he resumed his full time position with his regular employer. The plaintiff's termination from his regular employment five months later was due to personal conflicts and not to the residual effects, if any, of his accidental injury. Mr. Wood was not temporarily totally disabled as that status has been construed by this Court.

In fact, the plaintiff did not establish that he sustained any compensable disability, whether total or partial, as the term is defined by Professor Larsen. Although neurological examination revealed a slight brain wave irregularity after his fall, the applicant was not functionally incapacitated or physically limited in any manner as a result of this irregularity. The plaintiff testified that he experienced no physical difficulty or health problems after his injury, either before or after his resignation from Thompson Flying Service. (R. 72) His

own treating physician, Dr. LaVerne Erickson, found that in December of 1978 he exhibited no loss of function or symptoms of neurological impairment. (R. 5) And Mr. Wood asserted his right to certification as a pilot from January, 1979 until September, 1979 on the ground that he was, in fact, completely healthy. The plaintiff sustained no medical disability whatsoever.

Secondly, the plaintiff established no loss of earning capacity as a result of his injury. To the contrary, his salary was increased upon his return to Thompson Flying Service. Though the private tutoring in which he engaged after his departure may not have been profitable, his own work history establishes that his capacity to earn wages without flying as a pilot was not diminished by his injury.

Thus, the plaintiff failed not only to establish that he was totally disabled as a result of his injury, but that he sustained any compensable disability whatsoever other than his initial period of convalescence.

Plaintiff asserts his claim to compensation because of the refusal of the National Transportation Safety Board to certify him as a pilot for a period of time after his injury. Their finding was based on an irregularity in brain wave patterns that in no way constituted a physical incapacity and did not disqualify him from other gainful employment. The Commission's denial of temporary total disability benefits is supported by the plaintiff's own assertions before the Commission and before the National Transportation Safety Board that he was physically unimpaired after his injury, as well as by the opinion of his treating physician and [illegible]

work history after his injury. An inelegibility for flight status based upon the peculiar medical standards applicable to airline pilots cannot be equated with total disability to work, a condition the plaintiff clearly did not suffer. For this reason, the Commission's denial of the plaintiff's application for temporary total disability benefits should be affirmed.

POINT II

SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT PLAINTIFF WAS NOT INJURED IN THE COURSE OF HIS EMPLOYMENT

The Industrial Commission weighed the evidence and properly applied the law in making its additional finding that the plaintiff was not acting in the course of his employment at the time of his injury. The Commission found that the conduct in which the plaintiff engaged at the time was horseplay. It analyzed the evidence in accordance with the legal test of the compensability of injury arising from horseplay proposed by Professor Larsen in 1A Workmen's Compensation Law §23.00 and adopted by this Court in its decision in Prows v. Industrial Comm' Utah Sup. Ct. No. 16456 (April 4, 1980).

In Prows this Court held that an employee who was injured in a rubber band fight was entitled to compensation for his injury because his deviation from the performance of his regular duties was slight and because the activity in question was a customary and forseeable form of diversion among his fellow employees. In reaching its decision, this

Court noted that Utah Code Ann. §34-1-45 provides that an accident is compensable only if it arises "out of or in the course of" a claimant's employment. The Court adopted Professor Larsen's view that

> Whenever the basic controversy stems from the nature of a course of conduct deliberately undertaken by the claimant, there is primarily a question of course of employment.

Larsen, supra, Vol. IA, §2361 p. 5-140.

This Court then evaluated the evidence by applying the four part test espoused by Larsen for determining the compensabilit of an injury caused by horseplay initiated by the claimant, holding that,

> Whether initiation of or participation in horseplay is a deviation from course of employment depends on (1) the extent and seriousness of the deviation, (2) the completeness of the deviation (i.e., whether it was commingled with the performance of duty or involved an abandonment of duty), (3) the extent to which the practice of horseplay had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some such horseplay.

Prows, supra.

The plaintiff contends on appeal that at the time of his injury he was engaging in public relations responsibilities, that he and his co-workers discussed business related subjects during the evening, and that his horseplay was an insignificant deviation from his employment duties. Analyzing the evidence in the case at bar according to the principles announced in Prows, as the Commission did in its Findings of Fact and Conclusions of Law, it is clear, however, that substantial

evidence supports the administrative order.

The Commission was required at the outset to determine to what extent, and how severely, the plaintiff deviated from the course of his employment. Although Mr. Wood testified that his working hours were flexible and that occasionally he worked as late as 10:00 at night (R. 44, 45), he testified in reference to his gathering with co-workers on the evening of his injury as follows:

> That afternoon Barry Hansen--who was the one that was over-flying Las Vegas--came into my office, sat down, and indicated he was having some marital difficulties. And, because I had been through a divorce, he wanted to talk to me.
>
> So that evening after work, at about 8:00 o'clock, myself, Barry Hansen, Wayne Wienecke--the owner of Thompson's--Jim Powers--the Assistant of Maintenance of Thomspn's--plus Jim Hunt, a client of Thompson's, we all decided that we would, you know, talk this matter over.
>
> Because we were at the airport, and there was a Lear 35 in there, they ordered two six-packs of beer. We got the beer for them, they gave us each a can, and we stayed around there talking about the problem. (R. 41-42)(emphasis added)

It was the plaintiff's testimony that his purpose and the purpose of his co-workers in remaining at the airport after 8:00 o'clock in the evening was to discuss Mr. Hansen's marital problems. He referred to that period of time as "after work". Though it is not clear what other activities the group engaged in between 8:00 and 10:30 p.m., the time of the accident, the plaintiff testified that he consumed several cans of beer (R. 72) and that immediately prior to his fall he was riding around the airport in a golf cart on a trip which he never claimed was taken for an employment related purpose.

In determining the extent to which the injured employee in Prows, supra, had deviated from the course of his employment this Court stated

> Recognizing that "a little nonsense now and then is relished by the best of [workers]," it is clear that the better reasoned decisions make allowances for the fact that workers cannot be expected to attend strictly to their assigned duties every minute they are on the job. That is not to say that substantial excursions from job assignments need be tolerated or if injury occurs during such excursions, compensation need be paid. (emphasis added).

Prows, supra, p. 7.

The defendants submit there is substantial evidence that when he remained at the airport to drink beer, discuss marital problems and tour the area in a golf cart, the plaintiff embarked on a course of conduct which was totally outside the course of his employment.

The Commission next considered the completeness of the deviation, that is, whether or not it was comingled with the performance of employment related duties. The plaintiff testified that during the course of the evening he discussed employment related subjects as well as marital problems with his co-workers. (R. 70) He also testified that he was fulfilling "public relations" responsibilities during that period of time. (R. 44) The plaintiff did not specify what business topics were discussed during the evening nor what public relations duties he performed.

In evaluating whether the deviation from employment in the Prows case was complete, this Court referred to the following illustration made by Prof. Larson

> . . . the particular act of horseplay is entitled to be judged according to the same standards of exten[t] and duration of deviation that are accepted in orther fi[e]lds, such as resting, seeking personal comfort, or indulging in incidental personal errands. If an employee momentarily walks over to a co-employee to engage in a friendly word or two, this would nowadays be called an insubstantial deviation. If he accompanies this friendly word with a playful jab in the ribs, surely it cannot be said that an entirely new set of principles has come into play. The incident remains a simple human diversion subject to the same tests of extent of departure from the employment as if the playful gesture had been omitted.
>
> At the other extreme, there are cases in which the prankster undertakes a practical joke which necessitates the complete abandonment of the employment and concentration of all his energies for a substantial part of his working time on the horseplay enterprise. When this abandonment is sufficiently complete and extensive, it can only be treated the same as abandonment of the employment for any other personal purpose, such as an extended personal errand or an intentional four-hour nap. (footnotes omitted)(emphasis added)

1A Larsen at 5-142 to 5-143.

Contrasted to the plaintiff's general testimony that he engaged in work related activities on the evening of his injury is his testimony that the purpose of his gathering with fellow employees was to discuss personal problems (R. 42) and that the purpose of his horseplay in the golf cart was "to alleviate" some of his friend's problems. (R. 42) The Commission is, of course, required in its function as trier of fact to weigh an applicant's testimony and to determine the credence it should be accorded. In this instance, the plaintiff's own description of the circumstances of his injury support a finding that

the time and energy he devoted to a beer fight in a touring golf cart represented an abandonment of his employment even if he had discussed business at some point during the evening.

The extent to which horseplay has become a part of the plaintiff's employment also is to be considered in determining the compensability of his injuries. The plaintiff introduced no evidence before the Industrial Commission that beer fights in golf carts were a normal occurrence in the course of his employment. In the Prows case, evidence was adduced at the administrative level that employees engaged in rubber band fights at least two to three times a month, if not more frequently. Clearly, this Court concluded, such horseplay had become a part of the employment By contrast, in the case at bar there is no evidence that a beer fight had ever occurred among employees of Thompson Flying Service either during or after normal working hours, nor was there any evidence that such occurrences were a customary part of the plaintiff's employment.

Finally, the legal test applicable to injuries by horseplay requires an evaluation of the extent to which the nature of the plaintiff's employment may be expected to include some such horseplay. This Court stated in reference to the fourth basis of analysis that

> this element of Larsen's approach focuses on the forseeability of horseplay in any given employment environment and on the particular act of horseplay involved.

Prows, supra, p. 9

The defendants submit it is not reasonably forseeable that an employee who remains on his employer's premises after normal working hours to discuss a co-employee's marital problems will take a ride in a golf cart while drinking beer, will pour beer in a fellow employee's lap, and will lean backwards in the moving cart to avoid being showered with beer himself. Assuming the plaintiff's testimony is to be credited, that he was also discussing business and engaging in public relations on the evening of his injury, and assuming further that alcohol were a common incident of his public relations duties, it does not follow that the particular unusual act of horseplay which he initiated was forseeable.

This Court in Prows stated that

> By adopting the approach suggested by Larson, this Court does not intend the adoption of a test which by mechancial application will in cases involving horseplay dictate a "correct result". Indeed this approach is not susceptible of mechanical application but rather is intended as a method of analysis to assist the Industrial Commission in consideration of future cases coming before it involving horseplay. It is this Court's view that when the underlying policy of the compensation act is effecuated [sic] in the light of the analysis suggested herein, a rational result can be expected.

The Industrial Commission was required in this case to consider the evidence as a whole, to resolve inconsistencies in the applicant's testimony, to judge his credibility and to determine in light of the principles espoused by this Court whether the plaintiff was acting in the course of his employment at the time of him injury. The plaintiff's own testimony that

he was at the airport on the evening in question to discuss his friend's marital problems, that he drank beer during the time he was there and that he initiated a beer fight to cheer up his friend support the Commission's findings. The plaintiff's failure to describe the nature or purpose of any business activities which were said to have been conducted and the absence of evidence that similar horseplay was a customary or forseeable incident of his employment must also be considered in support of the Commission's order.

In sum, the defendants submit that the evidence was fairly weighed by the Industrial Commission in light of the proper legal analysis and that in ruling that the plaintiff's injury was not compensable the Commission in no way abused its discretion or exceeded its authority.

CONCLUSION

The evidence that the plaintiff was acting outside the course of his employment at the time of his injury was substantial and the defendants contend the Commission correctly ruled that the plaintiff's injury was not compensable. The Commission also ruled that the plaintiff was not eligible for the only benefits he sought, in that he was not totally disabled during the period for which he sought temporary total disability compensation. The plaintiff has never contended he was disabled as a result of his injury but only that he should be compensated because he was not able to be licensed as a pilot for the following year. As there is no basis in

law or fact for his claim to the benefits he seeks, the defendants submit the Commission would have been required to deny his application even if it had found that his injury occurred in the course of his employment. The Commission's Order should therefore be affirmed.

DATED this 12th day of June, 1980.

TIMOTHY C. HOUPT
Black & Moore
Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing BRIEF were mailed, postage prepaid this 12th day of June, 1980 to the following:

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